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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-968

JOHN VICTOR ROEDER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, John Victor Roeder, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 7, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit. not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Tenth Circuit was entered on November 7, 1975. A timely Petition for Rehearing was filed therein and was denied on November 26, 1975. A timely Motion for Stay of Mandate was filed therein and was granted on December 9, 1975. This petition for certiorari is filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Is the transportation of a female performer in interstate commerce for participation in the production of a sexually explicit motion picture as a performer or entertainer a violation of the Mann Act, 18 U.S.C. Section 2421?

2. Is the use of the Mann Act by the Federal Government to regulate sexually explicit performances in the production of motion pictures unconstitutional as an unconscionable and unconstitutional restraint on individual freedom of expression as guaranteed by the First Amendment?

3. Is such use of the Mann Act by the Federal Government an unconstitutional impingement on the right of the states individually to regulate conduct and expression under the police powers reserved to them under the Tenth Amendment?

4. Is such use of the Mann Act by the Federal Government an unconstitutional attempt to indirectly regulate obscenity and pornography on a national basis, in contravention of the law and the Tenth Amendment?

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CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Tenth Amendment to the United States Constitution

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

Section 2421

Whoever knowingly transports in interstate commerce, or in the District of Columbia or in any territory or possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice * * *

Shall be fined not more than $5.000.00 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

The petitioner, John Victor Roeder, was convicted on a one-count indictment after trial by jury on July 23 through July 24, 1974, before the Honorable Frank G. Theis in the United States District Court for the District of Kansas. The indictment charged a violation of 18 U.S.C. § 2421, in that defendant transported in interstate or foreign commerce from Kansas City, Missouri to Overland Park, Kansas a female for the purpose of prostitution, debauchery or other immoral purposes.

The facts of the case are, with one exception, undisputed. In substance, it stipulated that:

On December 1, 1970, petitioner telephoned one Bobbie Lynn Eicholz to advise her of arrangements to make a pornographic movie the following Sunday. On December 6, 1970, petitioner drove Eicholz from Missouri to Overland Park, Kansas.

During the trip from Missouri to Kansas, petitioner told Eicholz that when they arrived in Kansas they would make a movie in which petitioner and Eicholz would engage in various sexual acts and that she would be paid. After their arrival in Kansas they did engage in the mentioned acts, all of which were filmed. Upon concluding the filming appellant returned Eicholz to her home in Missouri and paid her a sum of money in compensation for her activities. Eicholz received none of the proceeds from the film's subsequent sale.

Petitioner admitted the production of the film and his performance therein but denied transporting Eicholz from Missouri to Kansas, stating that he had picked her

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up at her mother's home in Kansas. This testimony was refuted by Eicholz' mother.

In its instructions to the jury the Court charged that the term "other immoral purposes" contained in the indictment had no broader meaning than the term "prostitution".

On July 24, 1974, the jury returned a verdict of guilty. Judgment of conviction and commitment followed on October 4, 1974 for a violation of the Mann Act, 18 U.S.C. 2421, as charged in the indictment and petitioner was sentenced.

Petitioner appealed to the United States Court of Appeals for the Tenth Circuit. The Court of Appeals affirmed the conviction finding that, although the case was a variation from the accepted types of violation, it did not follow that the case escaped the thrust of the statute. The Court rejected petitioner's contention that a single transaction does not suffice to support a violation of the statute and found that the term "prostitution", as used in the Act meant only "the offering of the body to indiscriminate lewdness for hire or as sexual relations for hire". The Court further found that petitioner's conduct violated the statute because the sexual acts were an integral part, a cause, of the trip.

The Court of Appeals summarily rejected petitioner's argument that since petitioner's conduct involved the making of a film, a form of expression protected by the First Amendment, such conduct was placed beyond the reach of the Mann Act.

The Court of Appeals did not address itself to petitioner's argument that the federal government's use of the Mann Act to regulate sexually explicit performances

in motion pictures is unconstitutional as an impingement upon the right of the states severally to regulate conduct and expression under the police powers reserved to them under the Tenth Amendment, nor did it comment upon petitioner's further argument that such use of the statute was an unconstitutional attempt to indirectly regulate obscenity and pornography on a national basis.

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REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided an important question of Federal law which should be settled by this Court.

The Court of Appeals, by its affirmance of petitioner's conviction, extended the ambit of the Mann Act to include conduct that the Act was never intended to cover.

The framers of the Act clearly and specifically established by the wording that the Act was not directed at immorality in general but was directed specifically at the problems of prostitution, traffic in women for purposes of prostitution and like offenses. Moreover, the Act was clearly not intended to cover every type of sexual immorality or activity, but was essentially and primarily directed at prostitution and vices or offenses stemming from prostitution.

This Court in *Caminetti* v. *United States* (1917), 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 stated:

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the law is framed, and, if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the Courts is to enforce it according to its terms." (Citations omitted) . . .
>
> "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. (Citations omitted) There is no ambiguity in the terms of this act . . . Statu-

> tory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them." 61 L.Ed. at 452, 453.

Speaking for the Court, Mr. Justice Day then adopted the definition of prostitution established in the earlier case of *United States* v. *Bitty* (1908), 208 U.S. 393, 52 L.Ed. 543, 28 S.Ct. 396:

> "It refers to women who, for hire or without hire, offer their bodies to indiscriminate intercourse with men." 61 L.Ed. at 453.

Mr. Justice Day, in *Caminetti*, supra, quoted *United States* v. *Bitty*, supra, concerning the phrase "or for any other immoral purpose":

> "Now the addition in the last statute of the words 'or for any other immoral purpose' after the word 'prostitution' must have been made for some practical object.
>
> . . . It may be admitted that, in accordance with the familiar rule of ejusdem generis the immoral purpose referred to by the words 'any other immoral purpose' must be one of the same general class or kind as the particular purpose of 'prostitution' specified in the same clause of the statute." (Citations omitted). 61 L.Ed. at 453.

In *Athanasaw* & *Sampson* v. *United States* (1913), 227 U.S. 326, 33 S.Ct. 285, 57 L.Ed. 528, Ann. Cas. 1913E, 911, this Court approved lower court instructions in a case involving the White Slave Act, to the effect that the term "debauchery" carried with it "the idea of a life which will lead eventually or tend to lead, to sexual immorality." 33 S.Ct. at 287.

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The Mann Act was never intended to regulate performance in or production of sexually explicit or other motion pictures. Sexually explicit motion pictures fall under the classification of obscenity and not under the classification of prostitution. Obscenity is not synonymous with prostitution nor is prostitution synonymous with sexual intercourse. This Court has made it clear that motion pictures and theatrical productions are forms of expression entitled to prima facie First Amendment protection. *Burstyn* v. *Wilson* (1952), 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098; *California* v. *LaRue* (1972), 409 U.S. 109, 34 L.Ed.2d 342, 93 S.Ct. 390, rehearing denied, 410 U.S. 948, 35 L.Ed.2d 615, 93 S.Ct. 1351. To hold that the federal government may regulate sexually explicit performances in the guise of regulating prostitution would be equivalent to holding that while the federal government may not directly regulate sexually explicit motion pictures, they may be indirectly regulated through the use of the Mann Act. Since the performance of actors and actresses is an integral part of the production of a film such a holding is tantamount to a holding that films can be regulated by regulating their intrinsic components.

This Court has also held in *Miller* v. *California* (1973), 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, and allied cases (citations omitted) that supervision of motion pictures and other media is a right reserved to the several states under the Constitution of the United States. This Court has itself refused to impose such supervision on a federal or national level. Whether a motion picture is disqualified from the First Amendment's protective cloak is a question for determination by the appropriate state court or agency. In *Miller* v. *California*, supra, and in *Paris Adult Theater I* v. *Slayton* (1973), 413 U.S. 49, 37 L.Ed.2d 446, 93 S.Ct. 2628, this Court stated that it did not intend to tell the states

what they must do, but rather to define the area in which the states could chart their own courses in dealing with obscene material. To require a state to structure obscenity proceedings around a national community standard is not only an exercise in futility but an unconstitutional infringement on such state's reserved powers under the Tenth Amendment.

2. The case is one of first impression.

Previous to the decision of the Tenth Circuit Court of Appeals in the present case no federal court had held that interstate transportation of a woman for purposes of making a sexually explicit film constituted a violation of the Mann Act. By its decision the Circuit Court has, in essence, ruled that the production of a sexually explicit film is *per se* an immoral practice and, if coupled with interstate transportation, a violation of the Mann Act.

CONCLUSION

Petitioner respectfully submits that this proceeding involves important questions of federal law and that the case is one of first impression, for which reasons the case should be settled by this Court, and that the decision below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1853

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN VICTOR ROEDER,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Kansas

(Filed November 7, 1975)

Monti L. Belot, Assistant United States Attorney (Robert J. Roth, United States Attorney, on the brief), for Plaintiff-Appellee.

Michael Lerner of Barnett & Lerner (Barbara M. Vache of Barnett & Lerner, on the brief), for Defendant-Appellant.

Before HILL, SETH and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

The issue which we are asked to consider in this case—an appeal from a criminal conviction—is whether the trans-

portation by defendant of a female across state lines for the purpose of participating in various sexual acts with him for hire and for the purpose of producing a movie depicting these acts constitutes a violation of the Mann Act.

The indictment charges that "on or about the 6th day of December, 1970, the defendant did unlawfully, willfully and knowingly transport in interstate commerce from Kansas City, Missouri, to Overland Park, Kansas, a woman * * * for the purpose of prostitution, debachery (debauchery) or other immoral purposes, in violation of 18 U.S.C. § 2421."[1]

The facts in the case, with one exception, are undisputed. It is stipulated (in substance) as follows:

On December 1, 1970, appellant telephoned Bobbie Lynn Eicholz, the girl in the drama, to advise her of arrangements to make a pornographic movie the following Sunday.

On December 6, 1970, appellant drove Bobbie Lynn Eicholz from Missouri to Overland Park, Kansas, to the Hoge Funeral Home, and photographed the entrance.

During the trip from Missouri to Kansas, according to the testimony, appellant told Bobbie Lynn Eicholz that when they arrived in Kansas they would make a movie in

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1. This section provides:

Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * *

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

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which they, appellant and Eicholz, would engage in various sexual acts and that she would be paid.

After the arrival in Kansas they did engage in the mentioned acts, all of which were filmed. After the conclusion of the filming appellant returned Eicholz to her home in Missouri and paid her a sum of money which was to compensate her for her activities. She received none of the proceeds from the subsequent sale of the film.

Later there were arrangements made with Eicholz for her to travel to Hawaii for the purpose of making additional movies, and subsequently appellant and Eicholz did travel separately to Hawaii in early January 1971, where they made another movie of the same nature. She was paid for this as well.

Eicholz was convicted of conspiracy to violate the Mann Act in a separate proceeding.

There was testimony which corroborated that of Eicholz as to what occurred during the making of the movie. Other persons were invited to attend and several of these spectators paid a sum of money to watch the production of the film.

In appellant's testimony he admitted making the movie and performing the acts therein, but denied that he transported Eicholz from Missouri to Kansas, maintaining that he picked her up at her mother's home in Kansas. This latter fact was, however, refuted by Eicholz' mother.

The basic argument of appellant is that since the purpose of the transportation was to make a movie and not to promote the white slave business or was not directed at immorality, the Mann Act was not violated. The ultimate question is whether the fact that a movie was made and that payment was at least in part for this activity de-

tracts from the fact that sexual acts were performed and that money was paid incident to the acts.

In its instructions to the jury the court charged that the term "other immoral purposes" contained in the indictment had no broader meaning than the term "prostitution."

I.

We are of the opinion that the making of the movie does not serve to purge the transaction of its Mann Act character. It is true that the majority of Mann Act prosecutions involve what might be characterized as commercial vice. They are concerned with the most commonly thought of form of prostitution which is engaging in sexual acts for pay with more than one man. United States v. Wheeler, 444 F.2d 385 (10th Cir. 1971); United States v. Kennedy, 442 F.2d 444 (10th Cir. 1971). It is also true that there is no case exactly like the present one, but from this it does not follow that it escapes the thrust of the statute, for there have been variations from the accepted types of violations.

Defendant claims that the Mann Act's definition of prostitution which governs does not contemplate a single series of acts of intercourse; that it contemplates instead widespread traffic and prostitution including the exploitation of the woman; that a single transaction does not suffice. The Supreme Court has rejected this argument in Caminetti v. United States, 242 U.S. 470 (1917) and Cleveland v. United States, 329 U.S. at 17 fn.3.

Thus convictions have been upheld where defendant had relations with an individual woman without pay. Caminetti v. United States, *supra;* United States v. Reginelli, 133 F.2d 595 (3d Cir.), *cert. denied*, 318 U.S. 783, *re-*

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hearing denied, 319 U.S. 780 (1943); De Vault v. United States, 388 F.2d 179 (10th Cir. 1964).[2]

The often cited case of the Supreme Court which provides a definition of prostitution is Cleveland v. United States, *supra*. The opinion in that case contains the definition "the offering of the body to indiscriminate lewdness for hire. . . ." or as "sexual relations for hire." *Id.* at 17.

The Fifth Circuit in United States v. Sapperstein, 312 F.2d 694 (5th Cir. 1963), considered a case in which the women were transported for the purpose of performing in a nightclub. The Mann Act was held to be violated because their duties included engaging in acts of prostitution with the patrons. Along this same line the Seventh Circuit has held that where the transportation was for the performance of a strip tease act at a so-called stag party and where the sexual acts grew out of this and were not incident to the transaction, there was not a violation of the Mann Act. *See* United States v. Prater, 518 F.2d 817 (7th Cir. 1975). The indications from the court's opinion were that if the employment had been for sexual activity the result would have been just the opposite.

A further argument of defendant is based on Mortensen v. United States, 322 U.S. 369 (1944), in which the Supreme Court reversed the Mann Act convictions of defendants, operators of a house of prostitution in Nebraska, who took two of the girls living in the house as prostitutes

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2. In United States v. McClung, 187 F. Supp. 254 (D.C. La. 1960), the court held that a single act of intercourse between defendant and a willing woman (there is nothing in our case to indicate that Ms. Eicholz was coerced) was not violative of the act. *McClung*, however, is distinguishable since there the woman was uncompensated and, here, Ms. Eicholz was paid for her performance. Moreover, the activities in *McClung* appeared to be wholly private; in our case the activities were commercial and public.

on a vacation trip to Utah and then returned them to the house in Nebraska. But the trip itself was entirely innocent in its purpose; the girls were not hired out for acts of prostitution en route. Prostitution was not an integral part, a cause, for the trip.

In our case the performance of the acts was absolutely essential to the production of the movie, the acts could not be divorced from the movie making. This makes it sufficient to bring appellant within the Act. Cf. Mortensen v. United States, *supra;* De Vault v. United States, *supra;* United States v. Tyler, 424 F.2d 510 (10th Cir. 1970).

II.

We must reject the further contention of appellant that since it is a film the First Amendment not only clothes it but places it beyond the reach of the Mann Act. True, movies are forms of expression entitled to First Amendment protection, Burstyn v. Wilson, 343 U.S. 495 (1952), and acting in a movie is protected as well, Schacht v. United States, 398 U.S. 58 (1970), but the First Amendment does not constitute a license to violate the law. *Cf.* Miller v. California, 413 U.S. 15 (1973).

The important point is that Congress is within its powers in prohibiting the interstate transportation of a woman for the purpose of prostitution. Of itself it is not a suppression of speech or expression. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968).

The judgment of the district court is affirmed.

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